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Attorneys for Plaintiff AJMAL AKBAR dba COMMUNITY ONE
FINANCIAL AND REAL ESTATE SERVICES

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AJMAL AKBAR, an individual doing
business as COMMUNITY ONE
FINANCIAL AND REAL ESTATE
SERVICES,

Plaintiff,

vs.

LEXINGTON INSURANCE
COMPANY, a Delaware corporation,

Defendant.

Case No.: C07-04027 EMC

**CASE MANAGEMENT CONFERENCE
STATEMENT**

Date: November 14, 2007
Time: 1:30 p.m.
Judge: Honorable Edward M. Chen
Courtroom: C

Plaintiff Ajmal Akbar, an individual doing business as Community One Financial and Real Estate Services (hereinafter "Plaintiff"), submits this statement pursuant to L.R. 16-9. Since the sole defendant has not yet appeared in this case, Plaintiff must file a separate statement.

1. Jurisdiction and Service. The basis for subject matter jurisdiction over Plaintiff's claims is diversity of citizenship among the parties. Plaintiff's principal place of business is Fremont, California. Defendant Lexington Insurance Company (hereinafter "Insurer") is a Delaware corporation with its principal place of business in Boston, Massachusetts. Defendant is an insurer that regularly issues and delivers liability insurance policies to residents of the

1 Northern District of California; thus, this Court has personal jurisdiction over the defendant. To
2 facilitate settlement discussions that began shortly after Plaintiff's complaint was filed, Plaintiff
3 has agreed to hold off service of summons and complaint upon the Insurer. As of October 30,
4 2007, Plaintiff has submitted supporting documentation and detailed calculations of out-of-
5 pocket expenses and is waiting for Insurer's counter-offer to Plaintiff's settlement demand.
6 Plaintiff expects a settlement counter-offer from Insurer within the next two weeks and proposes
7 that the deadline of service of summons and complaint be December 4, 2007.

8 2. Facts:

9 a. This is an action by Plaintiff against Insurer for the breach of an insurance
10 contract and for breach of the implied covenant of good faith and fair dealing that
11 Insurer owes to Plaintiff. Plaintiff is a real estate and mortgage loan broker
12 licensed by the California Department of Real Estate. On or about September 7,
13 2005, Plaintiff obtained a Miscellaneous Professional Liability Insurance Policy
14 from Insurer (the "Policy"), the terms of which Insurer agreed to defend and
15 indemnify Plaintiff against liability resulting from Plaintiff's real estate and
16 mortgage loan brokerage business. The Policy is a "Claims Made and Reported
17 Policy" that was valid for claims made beginning on September 7, 2005 and
18 ending on September 7, 2006. The Policy applied to error or omissions occurring
19 on or after September 7, 2004.

20 b. Plaintiff brokered a mortgage refinancing loan transaction for Maricela
21 Gutierrez. The loan, which closed on July 8, 2005, was funded by another party,
22 Ownit Mortgage Solutions, Inc. (the "Lender"). The rescission disclosure given
23 to Ms. Gutierrez at the closing required that notice of a borrower's intent to
24 rescind the loan must be made directly to Lender not the broker. Ms. Gutierrez
25 did not give the Lender notice of her intent to rescind the loan. Instead, she
26 visited Plaintiff on July 18, 2007 requesting that he rescind the loan transaction.
27 Plaintiff was unable to do so because the rescission period had passed and Lender,
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1 not Plaintiff, is the only party that can rescind the loan. Ms. Gutierrez made
2 additional visits to Plaintiff complaining about the loan transaction, including a
3 pre-payment penalty she was required to pay. As a gesture of goodwill, Plaintiff
4 offered to reimburse Ms. Gutierrez for the amount of her pre-payment penalty, but
5 she never responded to this offer. Nearly one year later, Ms. Gutierrez
6 commenced an action against Plaintiff and Lender in the Superior Court of
7 California, County of Alameda, entitled *Gutierrez v. Akbar et al.* (Case No.
8 RG06276752) for damages allegedly suffered as a result of the mortgage loan
9 transaction brokered by Plaintiff. On August 8, 2006, Plaintiff was served with
10 Ms. Gutierrez's complaint, and he immediately gave Insurer notice of Ms.
11 Gutierrez's lawsuit. On or around August 16, 2006, Insurer acknowledged receipt
12 of Plaintiff's notice of the Gutierrez lawsuit and advised Plaintiff that it would
13 notify him shortly about its decision on whether it was going to defend and
14 indemnify Plaintiff for this lawsuit.

15 c. As of November 2006, Plaintiff did not receive any correspondence from
16 Insurer denying or confirming coverage, so Plaintiff retained his own attorneys to
17 defend him in the Gutierrez lawsuit. Plaintiff's defense counsel made numerous
18 attempts to obtain coverage confirmation from the Insurer, including voice mails
19 that were not returned and several letters advising Insurer of the case status and
20 demanding a coverage decision. On April 30, 2007, Plaintiff's counsel sent
21 Insurer written notice of Plaintiff's intent to file an action against Insurer for
22 breach of the insurance contract and for "bad faith." In response, the Insurer
23 faxed to Plaintiff's counsel on May 1, 2007 a letter purportedly dated September
24 18, 2005 from Insurer confirming denial of coverage for the Gutierrez matter. To
25 support its denial, Insurer argued that Gutierrez reported her claim on or around
26 July 2005, which is before the Policy was in effect. Plaintiff never received
27 Insurer's September 18, 2005 letter and was not provided proof of its delivery on
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1 the purported date by Insurer. On May 7, 2007, Plaintiff's counsel wrote a
 2 detailed letter analyzing California case law on the definition of "claim,"
 3 enclosing excerpts from Ms. Gutierrez's deposition transcripts regarding the
 4 details of her complaints to Plaintiff, and requesting Insurer to reconsider its
 5 denial of coverage. Insurer never responded to this request for reconsideration.

6 d. After numerous rounds of written discovery and seven depositions, the
 7 Gutierrez lawsuit was settled in mediation on June 13, 2007. Pursuant to the
 8 terms of the settlement, Plaintiff paid Ms. Gutierrez \$50,000 and her lawsuit was
 9 dismissed with prejudice. In addition to the settlement payment, Plaintiff incurred
 10 out-of-pocket legal fees and costs in excess of \$100,000 to defend himself in the
 11 Gutierrez lawsuit.

12 e. The principal factual disputes between Plaintiff and Insurer are: (1)
 13 whether Ms. Gutierrez presented a "claim" on July 2005 (shortly after the loan
 14 transaction closed) or on August 16, 2006 (when Ms. Gutierrez served Plaintiff
 15 with her complaint); and (2) whether Insurer's actions breach the implied
 16 covenant of good faith and fair dealing.

17 3. Legal Issues: The principal disputed point of law is the meaning of the term
 18 "claim" in the Policy.

19 a. The Policy states that: "**Claim** means a notice received by an **Insured**
 20 from a person or entity advising that it is the intention of that person or entity to
 21 hold the **Insured** liable for **Damages** for a **Wrongful Act** covered under this
 22 policy." Further, the Policy states that "**Damages** mean judgments [excluding
 23 fines, taxes, penalties, and punitive or exemplary damages] or settlements
 24 negotiated with the approval of [Insurer]."

25 b. A court's interpretation of an insurance policy "is governed by the clear
 26 and explicit meaning of the policy's written provisions." *Lenscrafters, Inc. v.*
 27 *Liberty Mutual Fire Insurance Co.* (N.D.Cal. 2005) 2005 WL 146896, *4. "If
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contractual language is clear and explicit, it governs.” *Id.* at *7 (citing *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264-1265).

c. Here, Insurer defines the term “claim” broadly to include Ms. Gutierrez’s request to Plaintiff to rescind the loan transaction on July 18, 2005. Plaintiff disagrees because Ms. Gutierrez did not give him notice of her intention to hold Plaintiff liable for damages until she served Plaintiff with her lawsuit on August 8, 2006.

4. Motions: None pending at this time.

5. Amendment of Pleadings: None pending at this time.

6. Evidence Preservation: Plaintiff’s counsel of record has in its possession evidence relevant to the issues reasonably evident in this action, including email and voice mail communications.

7. Disclosures: Since Insurer has not yet been served with the summons and complaint, initial disclosures have not yet been made.

8. Discovery: None pending at this time.

9. Class Actions: Not applicable.

10. Related Cases: The case giving rise to Plaintiff’s complaint, *Gutierrez v. Akbar et al.* (Alameda County Superior Court Case No. RG06276752) has been settled and dismissed with prejudice.

11. Relief: Plaintiff seeks from Insurer reimbursement of all legal fees and costs incurred in the defense of the Gutierrez lawsuit, indemnification for the settlement payment of \$50,000 made to Ms. Gutierrez, attorneys fees and costs incurred in this action, general damages, punitive damages, and other potential relief listed in his complaint.

12. Settlement and ADR: Shortly after Plaintiff filed his complaint, he and Insurer agreed to negotiate a settlement before Plaintiff served his complaint. Plaintiff has sent a formal settlement offer to Insurer. Insurer subsequently requested detailed documentation from Plaintiff to support his compensatory damage claims. As of October 30, 2007, Plaintiff provided Insurer

1 with all the documentation requested by Insurer. Plaintiff has not yet received a response or
2 counter-offer of settlement from Insurer. If the parties are unable to settle this matter shortly,
3 Plaintiff believes that negotiations will likely be resolved by court-sponsored mediation.

4 13. Consent to Magistrate Judge For All Purposes: Plaintiff respectfully requests
5 reassignment of this action to a United States District Judge.

6 14. Other References: As mentioned in paragraph 12 above, Plaintiff believes this
7 case is suitable for mediation.

8 15. Narrowing of Issues: Plaintiff will discuss narrowing of issues with Insurer if this
9 matter is not settled before the due date to serve the summons and complaint.

10 16. Expedited Schedule: Not applicable.

11 17. Scheduling: Plaintiff will work with Insurer to propose discovery and trial
12 scheduling dates if this matter is not settled before service of the summons and complaint is due.

13 18. Trial: Plaintiff requests a jury trial and expects the trial length to be 5 to 7 days.

14 19. Disclosure of Non-party Interested Entities or Persons: Plaintiff has filed the
15 certification required by Civil L.R. 3-16 disclosing the following non-parties: (1) Community
16 One Financial & Real Estate Services Corp; and (2) Yama Marifat.

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19 Date: November 7, 2007

Respectfully Submitted,

RANDICK O'DEA & TOOLIATOS, LLP

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22 By: _____
Patrick E. Guevara

23 Attorneys for Plaintiff AJMAL AKBAR dba
24 COMMUNITY ONE FINANCIAL AND REAL
25 ESTATE SERVICES
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